BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK ERIC BROOKS	)	
Claimant	)	
	)	
VS.	)	
	)	
BAKER'S APPLE MARKET	)	
Respondent	)	Docket No. 1,013,563
	)	
AND	)	
	)	
BENCHMARK INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the July 10, 2007 Review and Modification Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on October 9, 2007.

APPEARANCES

Kim R. Martens, of Wichita, Kansas, appeared for the claimant. Jeffrey W. Deane, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Following his work-related injury, claimant returned to work for respondent at an accommodated position at a comparable wage and was thus limited in his recovery to the

value of his functional impairment.[1] Respondent then sold its business and claimant was retained by the new owner. His employment continued for 2 years but on August 2, 2006, claimant was terminated. The ALJ concluded claimant's termination was not due to a lack of good faith and pursuant to the parties' stipulation, claimant was awarded the balance of the $100,000 available under K.S.A. 44-510f.

Respondent has appealed this decision and simply put, argues that Kansas law defines "for cause" as incompetence or inefficiency and therefore, the claimant's termination from his subsequent employment was appropriate. And because the termination was appropriate, the claimant is no longer entitled to a work disability under K.S.A. 44-510e(a). Respondent takes issue with the ALJ's legal analysis and his determination that because claimant failed to exhibit "bad faith" in connection with his termination and was merely an unacceptable employee, that he was nonetheless entitled to work disability. Respondent maintains that once the termination is determined to be appropriate, claimant's "bad faith" or lack thereof is irrelevant.

Claimant argues that the ALJ's decision was appropriate in all respects under Kansas law and should be affirmed.

The sole issue to be determined in this post award matter is whether claimant is entitled to a work disability over and above his functional impairment in light of his subsequent termination from his post-accident employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board incorporates the ALJ's factual statement and will not restate those facts again unnecessarily.

An injured employee is barred from a work disability under K.S.A. 44-510e(a) if he or she is earning 90 percent or more of the employee's pre-injury wage. It is well settled that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).[2] Additionally, the Kansas appellate courts have determined that permanent partial general disability benefits may be limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays

---

[1] K.S.A. 44-510e(a).

[2] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

at least 90 percent of the pre-accident wage.[3] And a termination for good cause can prohibit an employee from receiving an award of work disability.[4]

Here, claimant was working for a subsequent employer, earning a comparable wage, until August 2, 2006, when he was terminated. The reasons for that termination are at the heart of the parties' dispute.

The Board notes that the test of whether a termination disqualifies an injured worker from entitlement to a work disability remains one of good faith, on the part of both claimant and respondent.[5] However, respondent argues that once it establishes that claimant's termination was made for cause, the analysis ends and no work disability is due. This argument is based upon a generic definition of the phrase "for cause" as announced in *Decatur*[6], which indicates that standing alone, incompetence or inefficiency "or some other cause within the control of the employee which prohibits him from properly completing his tasks is also included within the definition." And because claimant was purportedly discharged because he was, in that employer's view, incompetent, inefficient, or in general just not a good "fit", that finding is tantamount to misconduct. And as a result, the claimant is not entitled to a work disability as he acted in bad faith in retaining his employment.

The difficulty with respondent's argument is that it ignores the fact that the focus on this issue is not solely on the employer and its good faith.[7] Rather, the claimant's actions are considered as well. More importantly, the *Decatur* opinion deals with a written employment contract and the question of whether the employer terminated the employment "for cause" in violation of that contract. While some of the principles might be

---

[3] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

[4] See *Ramirez v. Excel Corp*., 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999), and *Perez v. IBP, Inc*., 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[5] *See Helmstetter v. Midwest Grain Products, Inc.,* 29 Kan. App. 2d 278, 28 P.3d 398 (2001) and *Oliver v. Boeing Co*., 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[6] *Decatur County Feed Yard* v. *Fahey*, 266 Kan. 999, 1007, 974 P.2d 569 (1999).

[7] See *Helmstetter v. Midwest Grain Products, Inc.,* ___ Kan. App.2d ___, 18 P.3d 987 (2001), and *Oliver v. The Boeing Company-Wichita,* 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 886 (1999); *Tharp v. Eaton Corp.,* 23 Kan. App. 2d 895, 940 P.2d 66 (1997). But see *Graham v. Dokter Trucking Group,* ___ Kan. ___, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there. This suggests that the concept of "good faith", something that is not expressly contained within the statute, may no longer be valid in connection with claims for work disability under K.S.A. 44-510e(a).

generally applicable, workers compensation invokes additional and/or different concerns, as evidenced by the well established case law.

The Board finds that the ALJ's Order should be affirmed in all respects. Claimant may not have been a perfect employee, but there is an insufficient indication within this record to suggest that his job performance was the result of an intentional refusal to comply with his employer's rules. Rather, he was doing the best that he could given his skills and the changing nature of his job responsibilities. Sheer incompetence or subjective inability to "fit", standing alone, cannot serve as the basis for denying an injured claimant's recovery for a work disability. It may be that claimant's shortfalls were the proper basis for determining an employer's decision to terminate is appropriate. But this Board is unwilling to go so far as to adopt respondent's interpretation of such performance insufficiencies as the equivalent of misconduct or bad faith.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Award of Administrative Law Judge Bryce D. Benedict dated July 10, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2007.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Kim R. Martens, Attorney for Claimant
Jeffrey W. Deane, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge